A

KETUA PENGARAH KASTAM DIRAJA MALAYSIA & ORS

v.

B

KENWOOD ELECTRONICS MALAYSIA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[SUIT NO: S-21-31-2008]
26 APRIL 2013

C

CUSTOMS AND EXCISE: *Declaration - Under declaration - Claim for short paid import duty - Value of goods removed from licensed warehouses and licensed manufacturing warehouses - Burden or liability to pay import duty and sales tax - Whether there was under declaration of value on goods - Whether computation of import duty and sales tax correct - Customs Regulations 1977, reg. 29 - Customs Act 1967, ss. 65 & 65A*

D

CUSTOMS AND EXCISE: *Customs duties - Under declaration - Claim for short paid import duty - Value of goods removed from licensed warehouses and licensed manufacturing warehouses - Whether there was under declaration of value on goods - Whether computation of import duty and sales tax correct - Customs Act 1967, ss. 65 & 65A*

E

F

In the present claim, the plaintiffs alleged that the defendant had, through a series of acts, under declared the value of the goods that were removed from the licensed warehouses ('LWs') and licensed manufacturing warehouses ('LMWs') pursuant to ss. 65 and 65A of the Customs Act 1967 ('the Act'). The plaintiffs then sought from the defendant, a buyer of the goods from the LMWs *ie*, Kenwood Electronics Technologies (M) Sdn Bhd ('KETM') and Monotech Audio (Malaysia) Sdn Bhd ('MASB'), for the recovery of RM1,944,428.53 being arrears of short paid import duty of RM626,929.61 and sales tax of RM1,317,498.92. The goods on which the plaintiffs alleged short payment of import duty and sales tax accrued were manufactured at the premises of KETM and MASB, whereby both held warehouse and manufacturing warehouse licenses. KETM and MASB gave a guarantee to the first and second plaintiffs to pay any short paid import duty and sales tax on goods that were manufactured and sold/removed to local market. In denying the plaintiffs' claim, the defendant contended that: (i) it did not bear the burden or liability to pay

G

H

I

the import duty and sales tax in issue; and (ii) there was no under declaration of the value on the goods that were removed from the premises of KETM and MASB. The issues that arose for determination were (i) who bore the burden of paying short paid import duty and the sales tax on goods removed from LMW; and (ii) whether the computation of the import duty and the sales tax was correct.

Held (dismissing plaintiffs' claim with costs):

(1) The defendant was not liable to pay import duty. It was clear from the reading of reg. 29 of the Customs Regulations 1977 ('the Regulations') that the holder of a LMW license bears the responsibility of paying import duty and sales tax on any goods that were removed from the LMW. Based on the common evidence by employees or former employees from the Industry Division of the Customs Department, the conditions were imposed on the LMW licensee to furnish bank guarantee and general bond and in the event of any short paid import duty and the sales tax on the goods removed, a claim would be demanded from the LMWs concerned which in the instant case were KETM and MASB. (paras 15, 19 & 23)

(2) The value relied on by the customs to prove that there was under declaration of the value giving rise to short payment of import duty and sales tax on the goods removed from KETM and MASB was unreliable. Further, the plaintiffs did not produce the best evidence available to prove the value that was declared to the customs for the calculation of import duty and sales tax on the goods removed from the LMWs was lesser than the actual value in the open market by calling witnesses from, *inter alia,* KETM and MASB. On the other hand, the defendant's witnesses from the customs testified that the value declared was accepted by the customs. (para 38)

Case(s) referred to:

Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(foll)***

Arab-Malaysian Merchant Bank Bhd v. Chong On Foh Medical Hall & Liquor Dealers [1996] 1 LNS 113 HC ***(refd)***

Kedah Cement Sdn Bhd v. Masjaya Trading Sdn Bhd [2007] 3 MLJ 597 ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***

Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Customs Act 1967, ss. 2(1), 17, 22B, 65, 65A, 138
Customs Regulations 1977, reg. 29
Customs (Rules of Valuation) Regulations 1999, reg. 13(1)
Evidence Act 1950, ss. 73A(1)(i), 90A, 114(f)
Sales Tax Act 1972, ss. 23(1), 30

For the plaintiffs - Azamuddin Abd Aziz; SFC
For the defendant - V Kumaresan; M/s Huang Khairun Kumar & Assocs

Reported by Najib Tamby

JUDGMENT

Lau Bee Lan J:

Background

[1] The plaintiffs' claim against the defendant is for the recovery of the sum RM1,944,428.53 being arrears of short paid import duty of RM626,929.61 and sales tax of RM1,317,498.92.

[2] The plaintiffs allege the defendant has through a series of acts under declared the value of the goods that were removed from the Licensed Warehouses ('LWs') and Licensed Manufacturing Warehouses ('LMWs') pursuant to s. 65 and s. 65A of the Customs Act 1967 ("Customs Act").

[3] The defendant, Kenwood Electronics Sdn Bhd, ("KEM") a buyer of the goods from the LMWs, ie, Kenwood Electronics Technologies (M) Sdn Bhd of Tampoi, Johor ("KETM") and Monotech Audio (Malaysia) Sdn Bhd ("Monotech") denies the claim contending:

(a) that the defendant does not bear the burden or liability to pay the import duty and sales tax in issue; and

(b) that there was no under declaration of the value on the goods that were removed from the premises of KETM and MASB.

Evidence

[4] The facts agreed by the parties are as follows:

(a) Defendant is a company incorporated in Malaysia having its registered office at No. 14, Jalan SS21/58, Damansara Uptown, 47400 Petaling Jaya, Selangor Darul Ehsan.

(b) At all material times the goods on which the plaintiffs allege short payment of import duty and sales tax accrued were actually manufactured at the premises of KETM and MASB.

(c) KETM and MASB are both holders of Warehouse Licences and Manufacturing Warehouse Licence under s. 65 and s. 65A of the Customs Act.

(d) KETM and MASB are bound by the conditions imposed and attached to their respective Warehouse Licences and Manufacturing Warehouse Licence issued by the first and second plaintiffs pursuant to the Customs Act and Customs Regulations 1977.

(e) KETM and MASB have given a guarantee to the first and second plaintiffs to pay any short paid import duty and sales tax on goods that were manufactured and sold/removed to local market.

(f) The defendant is not a holder of a Warehouse Licence and Manufacturing Warehouse Licence under s. 65 of the Customs Act.

[5] The evidence adduced from the witnesses are the following except where it is otherwise stated under "Findings of the Court". Briefly, Encik Nadarajan a/l Yellumalai (SP1), Superintendent of Customs, 'Cawangan Pasca Import, Bahagian Perkhidmatan Teknik, Kastam Diraja Malaysia', Wilayah Persekutuan Kuala Lumpur testified between 6 to 8 April 2004, he together with several customs officers conducted an audit investigation on KETM following an application from KETM for the status of "Customs Golden Client".

[6] Whilst conducting the audit exercise, they found (i) the Production Agreement dated 1 October 1996 (exh. P1), (ii) tax invoice from KETM to KEM, (iii) commercial invoice, (iv) Customs Form No. 9 and (v) Customs Form No. 1A which were submitted for the purpose of declaration and payment of customs duty in Johor Bahru.

[7] Pursuant to the audit exercise on the documents it was found (i) KETM sold 100% of the goods which were manufactured to Kenwood Corporation, Japan ("KC") and (ii) KETM also delivered the goods to the defendant, which should not be the case as the goods have been sold to KC.

[8] The audit exercise conducted on KETM on 15 April 2004 found (i) KEM was appointed as the importer and sole distributor in Malaysia of Kenwood products *vide* the Distribution Agreement dated 1 April 1996 (exh. P3) and (ii) the defendant orders its merchandise from KC who in turn instructed KETM to deliver the goods to the defendant.

[9] The learned Senior Federal Counsel Encik Azamuddin, submitted:

> 1. Berdasarkan keterangan SD1, SD2, SD4 dan SD5, transaksi kebiasaan mengikut prosedur bagi pergerakan barangan dari LMW (dalam kes ini ialah KETM) ialah seperti berikut:
>
> - Pelesen Gudang Pengilangan berlesen (LMW) dikehendaki mengikrar semua barang siap yang dibawa keluar daripada sesuatu Gudang Pengilangan Berlesen menggunakan borang kastam No. 9 (BK9) kepada JKDM.
>
> - Kemudian, pegawai penilai (kastam) akan menilai harga yang diikrarkan oleh LMW dan akan mentaksirkan duti impot dan cukai jualan yang perlu dibayar.
>
> - Selepas taksiran, LMW perlu membayar duti impot dan cukai jualan tersebut.
>
> - Menurut mereka juga *seorang pelesen tidak dikehendaki membayar duti impot dan cukai jualan ke atas barangan yang diekspot ke luar negara daripada LMW.*
>
> - *Tanggungjawab membayar duti impot dan cukai jualan dan lain-lain bayaran yang kurang terbayar bagi barangan yang dibawa keluar daripada gudang ialah pada seorang LMW.*
>
> - *Mereka juga memberi keterangan bahawa ia bukanlah tanggungjawab pengguna atau pembeli barangan siap untuk membayar duti impot dan cukai jualan yang dibeli daripada sesuatu LMW.* (emphasis added)

[10] With respect I cannot agree with the learned SFC's submission that "keterangan saksi defendan (seperti di atas) adalah hanya pada prosedur bagi transaksi yang lazim (kebiasaannya)" for the following reasons.

[11] SP1 when cross-examined stated he was not well versed with the Industry Division of the customs and he does not know the difference between s. 65 and s. 65A of the Customs Act. However after referring to reg. 29 of the Customs Regulations 1977, SP1 agreed that the onus of paying import duty and sales tax on the goods that were removed from a LMW lies on the owner of the dutiable goods. On the other hand, the four defendant witnesses namely, SD1 (Cik Norizzan binti Maharuddin, the Superintendent of Customs attached to the Industry Division, Johore), SD2 (Encik Saidi bin Ismail who was in charge of 'Bahagian Perkastaman dan Cukai Dalaman'), SD4 (Encik Abdilahil Moktamin bin Mohamad, Superindent of Customs attached to the Industry Division of the Selangor Customs at Pulau Indah, Port Klang) and SD5 (Mr. Gnaneswaran a/l Krishna Saminathan, retired Senior Assistant Director of Customs) all of whom had experiences working at the Industry Division stated that pursuant to s. 65A Customs Act and reg. 29 Customs Regulations 1977, the burden of paying import duty and the sales tax rest on the respective LMWs which in this instant case are KETM or MASB.

[12] Further, the evidence which I have emboldened in para. 9 above is critical and material evidence from witnesses who work or had previously worked with the Industry Division of the Customs Department and have personal knowledge of the transactions pertaining to LWs and LMWs.

[13] In addition the court has to take into account the following evidence which has been ignored by the defendants. SD1 testified (i) they have the records on KETM and she identified the copies of the LMWs licenses (Bundle B pp. 6, 7, 8 and 9); and (ii) the records confirmed that the plaintiffs so far have not made any claim whatsoever against KETM on account of import duty and sales tax short paid. I find the plaintiffs have not cross-examined SD1 on this material part and it is tantamount to an acceptance of the witness' testimony (*Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138; [1981] 1 MLJ 212 at p. 213).

[14] SD2 who testified the Industry Division comes under his administration in 'Bahagian Perkastaman dan Cukai Dalaman' confirmed (i) the Customs Department has records on MASB, Jitra, Kedah; (ii) the conditions are attached to the warehouse licence and the LMW licence which he identified are in exhs. D14 and D15.

[15] The common evidence from SD1, SD2 and SD5 is that conditions are imposed on the LMW licensee to furnish bank guarantee and general bond and in the event of any short paid import duty and the sales tax on the goods that were removed, a claim would be demanded from the LMWs concerned which in this instant case are KETM and MASB.

Issues

[16] Based on the issues to be tried agreed by the parties (marked 'F') essentially there are two main issues to be determined:

(a) who bears the burden of paying short paid import duty and the sales tax on the goods that were removed from Licensed Manufacturing Warehouse (LMW) ('first issue'); and

(b) whether the computation of the import duty and the sales tax was correct ('second issue').

Findings Of The Court

First Issue

[17] It is pertinent for the court to reproduce s. 65 and s. 65A of the Customs Act and reg. 29 of the Customs Regulations 1977 as follows:

(a) **65. Licensed warehouse**

(1) The Director General may, at his absolute discretion, on payment of such fees as may be fixed by him in each case, grant a licence to any person, hereinafter in this section referred to as the licensee, and when granted withdraw any licence, for warehousing goods liable to customs duties and any other goods in a place or places specified in such licence.

(2) Any such licence shall be for such period and subject to such conditions as the Director General in each case may specify in the licence.

(3) …

(4) …

(b) **65A. Manufacture and other operations in relation to goods in licensed warehouse**

(1) In respect of a warehouse licensed under section 65, the Director General may, at his absolute discretion, on payment of such fees as may be fixed by him in each case, grant an additional licence to the licensee and when granted withdraw any such licence, **to carry on any manufacturing process** and other operation in respect of the goods liable to customs duties and any other goods.

(2) Any such licence shall be for such period and subject to **such conditions as the Director General may specify in the licence.**

(3) (a) No goods which have undergone any manufacturing process in the warehouse may be released for home consumption or export without the prior approval of the Director General.

(b) Subject to subsection (4), *if such goods are released from the warehouse for home consumption the customs duty thereon shall be calculated on the basis as if such goods had been imported*:

Provided ... (emphasis added)

(c) **29. Removal of goods from a customs warehouse, licensed warehouse, licensed manufacturing warehouse and inland clearance depot.**

(1) Whenever the **owner of dutiable goods** is desirous of removing the whole or part thereof from Customs Control otherwise than under bond or such other security as the proper officer of customs may approve he shall personally or by his agent:

(a) **Submit** to the proper officer of customs **a requisition in the form Customs No. 9 in the second Schedule** for permission to remove such goods, provided that the proper officer of customs may in lieu of such requisition accept the import declaration submitted under the provisions of subsection (1) of section 78 of the Act;

A

(b) Produce to the proper officer of customs the deposit receipt issued under the provisions of subsection (1) of section 67 of the Act;

(c) **Pay the customs duty and all charges assessed upon the goods to be removed.**

B

(2) The proper officer of customs shall thereupon authorise the removal of the goods:

Provided that nothing in these Regulations shall prevent the licensee of a warehouse licensed for the storage of dutiable petroleum from removing such petroleum in accordance with the arrangements made by him with the Director General under section 75 of the Act. (emphasis added)

C

D

[18] The other pertinent section is s. 2(1) of the Customs Act which reads:

(1) In this Act, unless the context otherwise requires:

"**dutiable goods**" means all goods subject to the payment of customs duty and on which duty has not yet been paid;

E

"**licensed warehouse**" means a warehouse or other place licensed for the warehousing of dutiable goods under **section 65**;

F

"**owner**" in respect of goods includes any person (other than an officer of customs acting in his official capacity) being or holding himself out to be the owner, importer, exporter, consignee, agent or person in possession of, or beneficially interested in, or **having any control of, or power of disposition over, the goods**;

G

(2) For purposes of this Act, *goods shall be deemed to be under customs control whilst they are deposited or held in any customs or licensed warehouse*, post office, or in any vessel, train, conveyance, aircraft, pipeline or place from which they *may not be removed except with the permission of the proper officer of customs*. (emphasis added)

H

[19] It is clear from a reading of reg. 29 that the holder of a LMW licence bears the responsibility of paying import duty and sales tax on any goods that are removed from the LMW. Based

I

on the evidence which I have alluded to in paras. 10 to 14 above, in this instant case, it is the LMWs, KETM and MASB which bear the burden of paying short paid import duty and sales tax on the goods that were removed from their premises.

[20] There is documentary evidence that condition 15 of the respective LMW licences issued to KETM (Bundle B pp. 7-9) and MASB (exh. D15) stipulate the following:

> Condition No. 15 to the license issued to KETM reads:
>
> 15. Pemegang lesen akan dikenakan Jaminan Bank RM350,000.00 dan Bon Am bernilai RM5,000,000.00 untuk menjamin keselamatan duti/cukai keatas bahan mentah/komponen, barang siap yang disimpan dalam gudang Pengilangan Berlesen dan pemindahan barang-barang berduti.
>
> Condition No. 15 to the license issued to MASB reads:
>
> 15. Pelesen akan dikenakan Bon Am sebanyak RM200,000.00 (Ringgit: Dua Ratus Ribu sahaja) untuk menjamin keselamatan duti/cukai ke atas bahan mentah/komponen, barang siap yang disimpan dalam gudang Pengilangan Berlesen dan pemindahan barang-barang berduti.

[21] With regard to the imposition of the bank guarantee and the general bond as pre-conditions to the issuance of the warehouse licence and LMW licence, I am persuaded by the argument of the learned counsel for the defendant, Encik V Kumaresan, that the said conditions imposed on the respective licensees, KETM and MASB amount to an agreement whereby the respective licensees assumed liability to pay any short paid import duty and sales arising from the removal of the goods from the premises. I draw support from the case of *Kedah Cement Sdn Bhd v. Masjaya Trading Sdn Bhd* [2007] 3 MLJ 597 at p. 598 where the Federal Court held, *inter alia*, that:

> The conduct of the contracting parties could be relied upon to ascertain the terms of the contract …

[22] There is evidence from the defendant witnesses that in the event of any short paid import duty and the sales tax on the goods that were removed pursuant to reg. 29 of the Customs Regulations a claim would be demanded from the LMW concerned. The plaintiffs did not challenge such evidence which remains uncontroverted.

[23] Section 17 of the Customs Act provides that the payment of customs duty short paid or erroneously refunded and likewise s. 30 of the Sales Tax Act 1972 with respect to sales tax is on the person liable to such custom duties/sales tax or other moneys. On the factual matrix of this instant case, the defendant is not liable to pay import duty but to reiterate, on the unchallenged evidence of the defendant witnesses and the legal provisions referred to, KETM and MASB bear the burden of paying the short paid import duty and the sales tax on the goods removed from the premises.

[24] The learned SFC submitted there was a Distributor Agreement between the defendant and KC Japan whereby the orders for purchase of the goods has to be made by the defendant to KC and payment has to be made to KC. I find there is merit in the submission of the learned counsel for the defendant in that the existence of the Distributor Agreement does not transfer the burden of payment of import duty and sales tax on the goods that are removed from the LMWs to the defendant. As alluded to before based on the legal provisions under the Customs Act and the uncontroverted evidence of SD1, SD2, SD4 and SD5, it is the LMWs concerned which bears the burden of payment of the import duty and sales tax which in this instant case are KETM and MASB.

[25] Further, SP1 when cross-examined whether it is an offence if KETM sends the goods to KEM, he replied in the negative and agreed that KETM did not sell the goods to KEM. Furthermore it is consonant with trade practice that orders for goods are made to the seller whilst the goods are sent by the manufacturer to the buyer and which practice the court is entitled to take cognisance of under s. 114(f) of the Evidence Act 1950.

[26] The learned SFC contended that he agreed with the defendant's submission that the burden of paying import duty and the sales tax which is short paid lies on the LMW but it applies only in a normal situation ("memang benar dalam keadaan biasa") whereas in this instant case "Transaksi antara KETM, KC dan KETM adalah berdasarkan P1 (Production Agreement) dan P3 (Distributor Agreement) yang membuatkan transaksi antara mereka berbeza dengan transaksi pada kebiasaannya yang dijelaskan oleh SD1, SD2, SD4 dan SD5."

[27] With due respect to the learned SFC, I am of the view that his argument is misconceived. Firstly, the issue of "luarbiasa" is not part of the plaintiffs' pleaded case and therefore this issue ought to be disregarded (see *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 at pp. 240 and 244.

[28] Secondly, ss. 65, 65A of the Customs Act and reg. 29 of the Customs Regulations 1977 which are the applicable provisions on who should bear the burden of paying import tax and sales tax make no exception as to its applicability in terms of "keadaan luarbiasa"; in other words these legal provisions are applicable in all situations.

[29] Thirdly, apart from the fact that orders for goods are made to the seller whilst the goods are sent by the manufacturer to the buyer which is in consonant with trade practice, SD5 had in examination in chief stated that this practice is normal and is permitted. This was not challenged by the plaintiff and is deemed to be accepted.

[30] Fourthly, evidence was led that a LMW could bring in to Malaysia only 20% of their manufactured goods. PW1 said that KETM had brought all their products into Malaysia. I agree with the defendant's submission this is contrary to condition 12 of the conditions attached to the LMW licence of KETM and as explained by SD5, if a licensee has committed any breach of the conditions to a licence, the said licensee is liable to be prosecuted in accordance with s. 138 of the Customs Act. Thereafter a civil action may be brought against the LMWs, KETM and MASB to recover any import duty or sales tax payable by way of a civil debt in accordance with s. 22B Customs Act and s. 23(1) Sales Tax Act respectively. In this regard I agree with the defendant's counsel that the plaintiffs are barking up the wrong tree in bringing this action against the defendant.

Issue 2

[31] In this regard I shall revert to the testimony of SP1 as follows:

[32] KETM prepared Customs Form No. 9, a prescribed form and submitted the same together with a commercial invoice for the purpose of obtaining the necessary permission from the customs for removal of the goods from their premises (LMW premises).

[33] The Customs Officers then proceeded to assess the import duty and sales tax on the goods that need to be paid to the customs before the removal of the said goods is authorised. Upon payment of the import duty and the sales tax on the said goods, the customs authorised the release of the said goods. Thereafter KETM delivered the said goods to KEM.

[34] KETM thereafter sent another invoice to KEM called "tax invoice" and demanded payment of the tax from KEM. KEM paid KC for the same goods on a price much higher than the price KETM declared to the customs when they removed the said goods with a declaration in Customs Form No. 9.

[35] The plaintiffs produced seven folders of documents comprising 7 volumes, C1-C7 (exhs. P16-P22 respectively) containing Customs Form No. 9, commercial invoices for each Customs Form No. 9 and another set of invoice corresponding to Customs Form No. 9. SP1 explained the under declaration of the value of the goods by referring to exh. P17.

(a) SP1 said (i) p. 46 is one of the Customs Form No. 9 and KETM supported the value of the goods with a commercial invoice issued by them found at p. 45; the value (at p. 45) is the same as the value declared to customs in Customs Form No. 9 (p. 46), which however is not the actual value; (ii) the actual value of the goods is the value stated in the invoice issued by KC to KEM at p. 24 of exh. P17.

(b) After comparing the goods stated in the commercial invoice (p. 45) and the goods in the invoice at p. 24 and perusing the model number of the goods, ie, CD receiver stated in p. 24, in cross-examination, SP1 stated that the goods mentioned on both the invoices were different in that the goods described in the invoice at p. 45 and declared to customs at p. 46, ie, "CD RECEIVER BRAND KENWOOD MODEL: KDC- 2018.IW" whilst the goods described in the invoice at p. 24 is "KDC-2018 CAR CD PLAYER".

(c) However in re-examination SP1 stated the invoice at p. 24 referred to the goods in the invoice at p. 45 and the goods declared in Customs Form No. 9 at p. 46 by relying on p. 7 of exh. P17 wherein SP1 said item No. 7 on p. 7 referred to the same product as that stated in p. 24.

[36] SD3, Mr Yap Kim Yin, the Finance Manager of the defendant testified that both the models referred to different goods and they are not the same and different models would have different implication on the value of the goods. SD3 did not waiver when cross-examined on this point.

[37] The learned SFC submitted:

> SD3 telah dengan sukarela ingin membuat pengiraan duti impot dan cukai jualan berdasarkan kesemua dokumen yang ada pada KEM. Walaupun dengan rujukan dibuat kepada syarikat percukaian, pihak KEM melalui SD3 telah menghasilkan dan menyerahkan penyata kiraan (P6) kepada SP1. SD3 juga telah mengesahkan perkara ini dan mengesahkan bahawa berdasarkan kiraan oleh KEM tersebut, diperolehi nilai duti impot dan cukai jualan yang kurang dibayar oleh mereka. Maka, keterangan SD3 sendiri bercanggah dengan apa yang didakwa oleh pihak Defendan bahawa kiraan yang dilakukan oleh pihak Plaintif-Plaintif adalah salah.

[38] In the light of the evidence, on a balance of probabilities I find the value relied on by customs to prove that there was under declaration of the value giving rise to short payment of import duty and sales tax on the goods removed from KETM and MASB is unreliable and I attach little weight to the same. Further, the plaintiffs did not produce the best evidence available to prove the value that was declared to customs for the calculation of import duty and sales tax on the goods removed from the LMWs is lesser than the actual value in the open market by calling witnesses from KETM, MASB and KC. On the other hand, the defendant witnesses from customs all testified that the value declared was accepted by the customs and the burden of paying the import duty and sales tax lies on KETM and MASB and not the defendant and such evidence remained uncontroverted.

[39] Regulation 13(1) of the Customs (Rules of Valuation) Regulations 1999 provides "The customs value of imported goods shall be calculated in Malaysian Ringgit and any currency conversion to determine the customs value shall be based on the rate of exchange issued by the Director-General."

[40] With respect to the invoices relied on by the plaintiffs to prove under declaration, ie, p. 45 and p. 24 in exh. P17, SP1 testified he used the exchange rate of 3.80 to convert the US dollars to Malaysian Ringgit as that was the rate in use at the

material time. However, SD5 testified the exchange rate that was in existence at any period of time can be obtained from the Customs Headquarters. I find SD5's evidence on this point to be reliable as it is consistent with reg. 13 of the Customs (Rules of Valuation) Regulations, unlike SP1's evidence which is unsubstantiated as no evidence was adduced of the exchange rate in force on the day of assessment of the tax by customs.

[41] In summary, in my judgment there is no under declaration of value as alleged by the plaintiffs as (i) customs relied on two different invoices which referred to two different goods (ii) customs failed to call the relevant witnesses to prove the actual value of the goods and (iii) the plaintiffs relied on the evidence of SP1, the investigating officer who stated he was not familiar with the matter as opposed to the evidence of SD1, SD2, SD4 and SD5, all of whom were customs officers attached to the Industry Division which deals with the supervision of the movement of goods manufactured by LMWs from licensed warehouses.

Other Matters

[42] I wish to highlight the reference of "P6" to the accounts of short payment of import duty and sales tax prepared by KEM made by the learned SFC in his submission that "SD3 telah menghasilkan dan menyerahkan penyata kiraan (P6) kepada SP1." (see para. 37 above).

[43] With respect I find the learned SFC has erred in referring to the document as "P6" when its status is still as "IDP6" because the defendant objected to its admissibility. For completeness, the defendant also objected to the admissibility of IDP7 and IDP10, both are letters from the Customs Department to the defendant. IDP7 is a letter dated 19 October 2004 titled "Bil Tuntutan Di Bawah Akta Kastam 1967 Dan Cukai Jualan 1972" whilst IDP10 is dated 9 November 2005 titled "Rayuan Ke Atas Notis Tuntutan Di Bawah Akta Kastam 1967 Dan Akta Cukai Jualan 1972".

[44] IDP6 titled as "Analysis of Import Duty & Sales Tax Variances Report for the period 1 April 2001 (0101) to 31 March 2004 (O312)" was confirmed by SP1 and SD3 to be a computer printed document. The defendant objected to its marking as exhibit as there was want of compliance with s. 90A of the

Evidence Act in that the plaintiffs neither produce a certificate to prove the document tendered was produced by a computer in the course of its ordinary use nor established the fact by oral evidence. I find there is merit in the defendant's objection following the case of *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800 at p. 830 where the Federal Court opined:

> In substance therefore the fact that a document was produced by a computer in the course of its ordinary use may be proved by the tendering in evidence of a certificate under s. 90A(2) [Evidence Act 1950] or by way of oral evidence.

[45] As for IDP7 and IDP10, the defendant objected to their marking as exhibits because the plaintiffs did not call the maker of the documents and the exceptions to s. 73A of the Evidence Act do not apply to the facts of the present case. I find there is merit in the defendant's objection in that (i) not only was the maker not called but even if the maker is not available, the proviso to sub-s. (1) of s. 73A(1)(i) of whether the witness is dead, or is physically or mentally unfit or is beyond the seas and it is not reasonably practicable to secure his attendance or (ii) where the maker is available but not called as a witness under the circumstances provided by sub-s. (2) of s. 73A of the Evidence Act do not apply (see *Arab-Malaysian Merchant Bank Bhd v. Chong On Foh Medical Hall & Liquor Dealers* [1996] 1 LNS 113; [1997] 4 MLJ 532).

Conclusion

[46] For the foregoing reasons, I find on a balance of probabilities the plaintiffs have not proven their claim and I dismissed the plaintiffs' claim with costs fixed at RM30,000 after hearing the parties on the issue of costs.